No. 80-324

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1980

BENNY CONIGLIO,

Petitioner,

against

THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

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Questions Presented

1. Whether the trial court's ruling that Jack Skulsky not be questioned as to his specific residence or the specific jurisdiction in which a marijuana prosecution was pending against him raised a substantial question of federal constitutional law.

2. Whether this Court has jurisdiction to consider a question of state evidentiary law, *i.e.*, the exclusion of extrinsic evidence to contradict a prosecution witness on a collateral issue.

TABLE OF CONTENTS

	PAGE
Questions Presented	1
Preliminary Statement	1
Statement of the Case	2
Reasons Why the Writ Should Be Denied	5
The Cross-Examination of Skulsky	6
The Refusal to Admit Extrinsic Evidence	8
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Alford v. United States, 282 U.S. 687, 692 (1931)	7
Smith v. Illinois, 390 U.S. 129 (1968)	7
United States v. Alston, 460 F.2d 48 (5th Cir. 1972), *cert. denied*, 409 U.S. 871 (1972)	7
United States v. Marti, 421 F.2d 1263 (2d Cir. 1970)	7
United States v. Teller, 412 F.2d 374, 379 (7th Cir. 1969), *cert. denied*, 402 U.S. 949 (1971)	7

Statute:

28 U.S.C. § 1257	8

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Preliminary Statement

This is a petition for a writ of certiorari to review the order of the Supreme Court of the State of New York, Appellate Division, First Department, entered March 25, 1980, which unanimously affirmed the April 25, 1979 judgment of the Supreme Court, Bronx County, which convicted petitioner and his co-defendant George Clementi, after a trial by jury, of Murder in the Second Degree [New York

Penal Law § 125.25(1)] and sentenced petitioner to an indeterminate term of life imprisonment with a minimum term of twenty-five years. Leave to appeal to the New York Court of Appeals was denied by Associate Judge Bernard S. Meyer of that Court on June 27, 1980.

Petitioner is presently incarcerated pursuant to the judgment of conviction.

Statement of the Case

In the early morning hours of May 28, 1973, Thomas Genco was killed by a single shot from a .38 calibre gun as he stood in front of the Cabaret Lounge in Bronx County. Petitioner and George Clementi were indicted for the slaying by the Bronx County Grand Jury on June 28, 1973, but neither man was apprehended until 1977. On April 25, 1979, following a joint trial by jury, both were convicted of intentional murder.

The prosecution's case against petitioner consisted of strong circumstantial evidence. His presence in the Cabaret Lounge, at the far end of the bar, was established by four witnesses. Two of the witnesses, Gus Santoro and Jack Skulsky, provided the motive for the crime; both saw petitioner and Clementi argue with Genco shortly before the shooting, and Skulsky recalled that Clementi struck Genco. As the fight subsided, petitioner warned Genco that their dispute wasn't over. Genco was shot when, having stood outside the bar for some time after the argument, he leaned into a black car which had pulled up. The sole witness, Nick DiGiorno, merely heard a gunshot and saw

Genco fall on his back, but did not see who was inside the car. Likewise, Michael Vivenzio, who stepped out of the bar moments afterward, could only see that two men were in the late model, black car as it sped away.

However, petitioner was tied directly to the shooting by two witnesses who had seen him with a black, late model automobile outside the bar immediately before the shooting. Theresa Cicale testified that she spoke to petitioner, whom she knew, directly outside the Cabaret Lounge. John Genco, brother of the deceased, spotted petitioner and Clementi standing outside the bar next to a double-parked black car talking to Theresa. He recognized them as the pair he had seen earlier at the far end of the bar, staring at his brother Tommy. John Genco walked halfway down the street to get his own car. As he started it, he saw the same black car that had been double-parked in front of the bar back up until it was directly in front of him. Inside, he saw the same two men whom he had seen talking to Theresa Cicale and standing at the far end of the bar. They suddenly sped off back in the direction of the Cabaret Lounge.

That petitioner had indeed been one of the killers was confirmed by Nanette Sanzo, whom he subsequently met and lived with for two months in Hollywood, Florida. Coniglio told her that "he had shot someone in the head in the front of a bar in New York, over ten thousand dollars," and that at the time of the shooting, he was seated in the car. The prosecutor also introduced evidence that petitioner had ceased reporting to his job on the day of the murder, never to return, that four years elapsed between the murder and his arrest, during which he had been

living under the name of Benjamin DeGrosse, that he maintained a Florida driver's license in that name, and that when arrested, he possessed a car rented to him in that name at an address in Hollywood, Florida.

Prior to the testimony of Jack Skulsky, the prosecutor requested that "no questions be asked by defense counsel as to the present residence of this particular witness." The prosecutor had earlier informed the court that Skulsky had received an "unusual" phone call prior to his testimony and was concerned about his well-being. When the court demanded a showing before it would grant the request, the prosecutor reported that Skulsky feared his life was endangered, based, in part, upon a "strange phone call received by Nanette Sanzo which caused alarm to the prosecution. The court thereupon ruled that, to assure the witness' security, it would not permit questions as to Skulsky's actual residence or the jurisdiction in which a marijuana prosecution against Skulsky was pending. However, the court specified that these would be the only such limitations, and the defense could fully inquire into the facts and circumstances surrounding Skulsky's arrest, the nature of and penalties for the crime charged, and any promises, agreement or understanding he might have had with the prosecutor's office. Counsel for petitioner indicated that he knew where Skulsky lived and the jurisdiction where the marijuana charges were pending. (See Petition for Certiorari, Appendix C, pp. 4a-8a).

Nanette Sanzo testified that she had met petitioner in 1973 and denied, on cross-examination, that she knew him on July 18, 1971. On cross-examination, defense counsel

sought to introduce a photograph of the witness and Benny Coniglio, on the back of which was written a pre-1973 date. Counsel's only stated basis for offering the photograph was to prove the existence of a relationship between Sanzo and petitioner "prior to the date in question." The court ruled the exhibit inadmissible both because the writing on it was hearsay and because the picture by itself lacked any probative value. Although defense counsel asked whether he might call the photographer to testify as to the photograph's date, the court never ruled on that question, and neither the photographer nor any other witness was called to testify as to a prior relationship between petitioner and Sanzo. (See Appendix D to Petition for Certiorari, pp. 9a-14a).

Neither petitioner nor his co-defendant Clementi called any witnesses or presented any evidence on their own behalf.

Reasons Why the Writ Should Be Denied

Petitioner asserts that his Sixth Amendment right to confrontation was abridged by two unrelated rulings of the trial court: 1) its exclusion of Jack Skulsky's residence and the jurisdiction in which a marijuana prosecution was pending against Skulsky, and 2) its refusal to admit extrinsic evidence contradicting Nanette Sanzo's testimony that she had not known petitioner prior to 1973. Neither of petitioner's claims merits the consideration of this Court, for in each instance it was defense counsel's unwillingness to pursue open avenues of inquiry, rather than any ruling by the court, which precluded him from impeaching the witness' credibility.

The Cross-Examination of Skulsky

Petitioner assails the trial court's rulings that he could not elicit Skulsky's residence or the particular jurisdiction in which a marijuana prosecution was pending against him. Although petitioner complains primarily that the court precluded him from inquiring into the possible penalties faced by Skulsky the court in fact specifically permitted inquiry into that area (Petition, Appendix C, pp. 6a-7a). Significantly, however, counsel for petitioner did not even ask Skulsky about those penalties. By his own admission (Petition, Appendix C, pp. 4a-5a) counsel knew the jurisdiction in which the prosecution was pending and could readily have ascertained the maximum penalties and confronted Skulsky with them. Having chosen not to do so, he can hardly pass the blame to the court. Similarly, he asserts that by not having to reveal his residence, Skulsky could testify falsely as to "his mode of life, his other criminal activities, his associations and behavior without real fear of refutation as to any significant misstatements" (Petition, pp. 9-10). Once again, however, petitioner's trial counsel asserted that he knew where Skulsky resided (Petition, Appendix C, pp. 4a-5a), and so presumably thoroughly investigated his background. He could easily have confronted Skulsky with any damaging findings had he elected to do so. Moreover, whether petitioner could have refuted, by extrinsic evidence, "any significant misstatements" of his background (he points to none) is a separate question of state evidentiary law wholly divorced from the question of revealing his residence to the jury.

Petitioner was also permitted to thoroughly examine Skulsky concerning the issue which bore most directly upon

his credibility, the nature of any promises made to him *vis-a-vis* his pending charge, and with regard to the facts and circumstances underlying that charge (Petition, Appendix C, p. 8a). The fact that he had resigned from the police department after admitting to smoking marijuana was revealed to the jury and supplied grist for cross-examination. Thus, while the court's ruling that Skulsky could not be asked about the state of the prosecution or where he lived raised, on its face, a federal question, the fact that counsel was thereby not hampered in his cross-examination, but instead elected not to pursue certain avenues, renders it a question without substance in this case.

Moreover, the question of whether a defendant's right to confrontation is unduly restricted by the exclusion of a material witness' address is hardly a novel one demanding determination by this Court. In *Alford* v. *United States*, 282 U.S. 687, 692 (1931), the Court held that a defendant must be given "the opportunity to place the witness in his proper setting," and thereby test the weight of his testimony and his credibility. This standard was applied again in *Smith* v. *Illinois*, 390 U.S. 129 (1968). Neither case established a rule that the exclusion of the witness' address is *per se* prejudicial, and the circuit courts have universally recognized that there is an exception where, as here, the witness' safety may be jeopardized, so long as the defendant had the opportunity to meaningfully cross-examine the witness. *See e.g., United States* v. *Alston*, 460 F.2d 48 (5th Cir. 1972), *cert. denied*, 409 U.S. 871 (1972); *United States* v. *Marti*, 421 F.2d 1263 (2d Cir. 1970); *United States* v. *Teller*, 412 F.2d 374, 379 (7th Cir. 1969), *cert. denied*, 402 U.S. 949 (1971). In the instant case, petitioner does not call for an expansion or alteration of any of these holdings,

but merely for this Court to apply the *Alford* rule to his own case. Clearly, there is no reason for this Court to divert its limited time and energies from more pressing questions to perform what is essentially the task of intermediate appellate courts, least of all to consider a question as insubstantial as that presented here.

The Refusal to Admit Extrinsic Evidence

Petitioner alleges that the trial court's denial of his attempt to introduce extrinsic evidence contradicting Nanette Sanzo's testimony that she did not know petitioner before 1973 precluded him from establishing bias on her part. Counsel, however, never formally attempted to introduce the purported "evidence," nor obtained a ruling from the court on its admissibility. In fact, the only extrinsic evidence which he did offer was, by his own admission, properly excluded as hearsay—a photograph of Sanzo and petitioner which had an earlier date written on the back of it (Petition, p. 11). While petitioner now asserts that "the defense inquired if it might call the photographer" (Petition, p. 12), it never secured a ruling from the court and, indeed, never did attempt to call the photographer or any other witness who might contradict Sanzo as to the date. Nor, in fact, did petitioner even assert that he actually had any such witnesses available to testify.

Even had he proffered such evidence, its admission would have been purely a matter of state law, and not subject to the jurisdiction of this Court. 28 U.S.C. § 1257. While petitioner attempts to bootstrap the issue into this Court by portraying it as a denial of the right to confrontation, in that he was allegedly precluded from proving

Sanzo's bias or hostility, he never presented it as a constitutional claim at trial. In fact, he never even suggested there that he was attempting to prove bias or hostility. The record reveals that he offered the photograph merely to contradict Sanzo's testimony as to when she had met petitioner (Petition, Appendix D, p. 13a). This was hardly surprising since, as petitioner is forced to concede, the matter sought to be proved by extrinsic evidence "was not in itself obviously indicative of hostility or bias on the part of the witness" (Petition, p. 13). Clearly, therefore, even if he had attempted to call the photographer himself to contradict her testimony, he would merely have presented the court with an evidentiary issue—whether extrinsic evidence may be admitted to prove a collateral fact denied by a witness—an issue which we submit is a matter of state law, falling far short of constitutional dimension and the jurisdiction of this Court.

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

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October 1980